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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 UNITED STATES OF AMERICA,

8 Plaintiff,

9 vs.

10 KURT W. BRAIN,

11 Defendant.

No. 1:16-po-08143-MKD

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

12 This matter came before the undersigned magistrate judge for a bench trial
13 on April 21, 2017. Legal intern, Courtney Hall, supervised by Assistant United
14 States Attorney Meghan McCalla, appeared on behalf of the United States. Troy
15 Lee appeared on behalf of Defendant Kurt W. Brain.

16 Defendant was charged by Violation Notice with hunting migratory game
17 birds by the aid of bait in violation of 50 C.F.R. § 20.21(i). At the trial, the United
18 States offered testimony from U.S. Fish and Wildlife Services Officer Brent
19 Scherzinger and Kittitas County Sheriff's Office Deputy Ben Kokjer. Defendant
20 offered testimony from Don Caraway. Defendant also testified. The Court

1 admitted Exhibits 1-4, 6-27, and 29, which were photographic and video exhibits
2 depicting the relevant physical area on December 5, 2015. The Court admitted
3 Defendant's Exhibit 100 for demonstrative purposes. Based on the testimony and
4 evidence admitted, the Court finds Defendant Kurt W. Brain GUILTY of the cited
5 offense, and makes the following Findings of Fact and Conclusions of Law:

6 **FINDINGS OF FACT**

- 7 1. On December 5, 2015, Defendant Kurt W. Brain, Don Caraway, Kenneth
8 Caraway, and a fourth man (first name Tim) were hunting geese on the
9 Caraway brothers' family property, in the area of 1315 West Dolarway Road
10 in Ellensburg, Washington, which is located in the Eastern District of
11 Washington.
- 12 2. Around 6:30 a.m., shortly before daylight, Defendant, Don Caraway, and
13 Kenneth Caraway set up approximately nine dozen goose decoys in the field
14 behind the house.
- 15 3. After setting up the decoys, the hunters sought shelter from the cold in a
16 building to keep warm by a stove until close to daylight.
- 17 4. At or shortly before 7:15 a.m., the hunters took position in a hunting blind
18 on the Caraway's property. The purpose of a hunting blind is to shield
19 hunters from view of game; hunting blinds are routinely used when hunting
20 geese. The hunting blind was situated amongst the goose decoys.

- 1 5. After arriving at the hunting blind, the individuals began hunting. Defendant
2 and Don Caraway left the hunting blind to retrieve geese they had shot from
3 the field.
- 4 6. Someone made a trespassing/weapons complaint regarding the hunting
5 activity on the Caraways' property. U.S. Fish and Wildlife Service Officer
6 Brent Scherzinger, Kittitas County Deputy Ben Kokjer and Kittitas County
7 Reserve Officer Jordal responded to the complaint.
- 8 7. When he responded to the area, Officer Scherzinger observed three
9 individuals in a hunting blind on the property.
- 10 8. Between approximately 8:45 and 9:00 a.m., Officer Scherzinger, Deputy
11 Kokjer and Reserve Officer Jordal met at the house on the property, then
12 walked across the hunting field toward the hunting blind. At the time the
13 officers responded, it was lightly snowing.
- 14 9. To get to the hunting blind, the officers walked across the hunting field
15 approximately 100 to 150 yards. In doing so, they passed several groups of
16 goose decoys.
- 17 10. Officer Scherzinger noticed that grain was spread across the snow in the
18 field on both sides of the fence. Some of the goose decoys were positioned
19 over the grain, with their necks bent down to appear as if they were eating
20 the grain.

1 11. The grain was scattered throughout the field. There were some
2 concentrated areas or patches, as well as less concentrated areas where grain
3 was scattered. The grain was located on top of the snow.

4 12. One of the concentrated areas of grain was approximately eight to ten feet
5 from top to bottom and ten feet from side to side. This particular area of
6 grain was located approximately ten yards from the hunting blind. It was
7 visible from a significant distance and was readily visible from the hunting
8 blind.

9 13. When positioned in the hunting blind, the hunters were facing the direction
10 of the patch of grain that was ten yards from the blind.

11 14. The officers contacted three men at the hunting blind, including Defendant.
12 At the initial contact, Defendant stated he was hunting coyotes. Later, after
13 additional questioning, Defendant admitted he was hunting geese.

14 15. Officer Scherzinger determined that Defendant had a valid hunting license
15 that covered both geese and coyotes, among other small game and water
16 fowl.

17 16. In the hunting blind, the officers found several dead geese.

18 17. Officer Scherzinger observed boot tracks in the snow throughout the field,
19 including adjacent to and through the exposed grain.

20 18. Officer Scherzinger issued Defendant a citation for violating 50 C.F.R.

1 **C. The Standard for Knew or Reasonably Should Have Known Under**
2 **50 C.F.R. § 20.21(i)**

3 In pretrial briefing, the United States urged the Court to apply the Fifth
4 Circuit’s interpretation of Section 20.21(i), which holds that a hunter knew or
5 reasonably should have known that he was hunting over a baited area if the
6 presence of bait could reasonably have been ascertained by a hunter wishing to
7 check the area for illegal devices. *United States v. Lee*, 217 F.3d 284, 288-89 (5th
8 Cir. 2000); ECF No. 31 at 3-4. This standard is somewhat akin to placing a burden
9 on hunters to reasonably inspect the area to be hunted. *Lee*, 217 F.3d at 289. The
10 United States contends that the 1998 amendment to the Migratory Bird Treaty Act
11 which added the “knew or should have known” language also incorporated the
12 standard set forth by the Fifth Circuit. ECF No. 31 at 3. *Lee*, however, was not
13 decided until after the 1998 amendment, and it interpreted the statute as it read in
14 1997, when the facts of that case arose. Therefore, the Court finds no clear
15 congressional intent that the meaning of “knew or should have known” in 50
16 C.F.R. § 20.21(i) requires a hunter to make an inspection of the area to be hunted
17 for bait. The Ninth Circuit has not interpreted this element of 50 C.F.R. § 20.21(i).
18 The Court declines to adopt the Fifth Circuit standard. Instead, as the Court
19 informed the parties at the pretrial conference, the Court will apply the plain
20 meaning of “knew or should have known” to the language in 50 C.F.R. § 20.21(i).

1 **D. Findings**

2 **1. Defendant Took or Attempted to Take Migratory Game Birds**

3 The evidence established that Defendant took and attempted to take
4 migratory game birds. Under the statute, geese are classified as migratory game
5 birds. *See* 50 C.F.R. § 20.12; 50 C.F.R. § 12.11(a)(1). Officer Scherzinger
6 testified that on December 5, 2015, Defendant was contacted in a hunting blind
7 that contained dead geese. The circumstances were indicative of hunting of geese,
8 including the use of a hunting blind, the use of goose decoys, the presence of
9 shotguns, and the presence of bait, specifically grain. After initially denying he
10 was hunting geese, Defendant subsequently admitted to Officer Scherzinger that
11 Defendant was in fact hunting geese. Finally, in his trial testimony, Defendant
12 admitted that he was hunting geese on December 5, 2015. The Court finds the
13 United States proved this element beyond a reasonable doubt.

14 **2. Defendant Was Hunting Over a Baited Area**

15 The evidence established that Defendant was hunting over a baited area.
16 The statute defines “baited area” as “any area on which salt, grain, or other feed
17 could serve as a lure or attraction for migratory birds to, on, or over areas where
18 hunters are attempting to take them.” 50 C.R.F. § 20.11(j). There was significant
19 evidence that grain was spread over the area in which Defendant was hunting.
20 Officer Scherzinger testified that there was a substantial amount of grain spread

1 throughout the field, including grain near and under many of the decoys. The
2 photographic and video evidence established that there was grain in the hunting
3 field amongst the decoys and specifically near the blind. Don Caraway testified at
4 trial to the presence of grain in the hunting area when the officers arrived on the
5 morning of December 5, 2015. The Court finds the United States proved this
6 element beyond a reasonable doubt.

7 **3. Defendant Knew or Reasonably Should Have Known He Was**
8 **Hunting Over a Baited Area**

9 The Court concludes that Defendant knew and reasonably should have
10 known that he was hunting over a baited area. First, the quantity of grain indicates
11 Defendant knew or reasonably should have known of its presence. The testimony
12 and photographic evidence showed there were concentrated areas of grain in the
13 hunting field, between the house and the hunting blind. One specific patch was
14 large in size. Specifically, the patch of grain closest to the hunting blind was
15 approximately eight to ten feet from top to bottom and approximately ten feet from
16 side to side.

17 Second, the location of the grain and close proximity to the hunting blind
18 contributes to the finding Defendant knew or reasonably should have known of its
19 presence. Specifically, the largest section of grain (eight to ten feet high and ten
20 feet across) was located approximately ten yards from the hunting blind, where the
hunters had been hiding. This specific section was readily visible from the blind.

1 Moreover, Defendant testified that when in the hunting blind, he was facing this
2 specific section of grain because that is the direction from where the geese flew.
3 From the photographic and video evidence, it is clear that there was no grass or
4 other obstruction concealing this grain; it was laying on top of the snow directly in
5 front of the blind.

6 Defendant argues that Deputy Kokjer's failure to notice the grain when he
7 approached the hunting blind supports a finding that Defendant was not reasonably
8 expected to be aware of the grain. However, Deputy Kokjer, a law enforcement
9 officer, was not in the same situation as Defendant, a hunter. The Court is
10 persuaded by Deputy Kokjer's explanation that when he approached the hunting
11 group, he focused his attention on the hunters as they were in possession of
12 weapons and he was responding to a weapons complaint. Moreover, Deputy
13 Kokjer explained that he had an inexperienced reserve officer with him. Deputy
14 Kokjer was focusing on the safety of the encounter and not on the surrounding
15 details such as the substance on the ground. Moreover, he testified that after he
16 made the initial encounter, the grain's presence was obvious to him.

17 Third, Defendant's movements to and from the blind exposed him to the
18 presence of the grain. Defendant initially was in the field placing the decoys. He
19 subsequently traversed the field in order to enter the hunting blind. Then, after the
20 hunters shot geese, Defendant left the hunting blind and retrieved the dead geese

1 from the hunting field. Based on the photographic evidence, it would be nearly
2 impossible to leave the hunting blind to traverse the hunting field and not
3 encounter grain.

4 Fourth, when initially contacted by law enforcement, Defendant denied he
5 was hunting geese and stated he was hunting coyotes. Only after being further
6 questioned by Officer Scherzinger did Defendant subsequently admit he was
7 hunting geese. The Court finds Defendant's false statement to the officer to be
8 indicative of a consciousness of guilt in that he did not initially disclose he was
9 hunting geese because he knew they were doing something improper.

10 Defense counsel sought to undermine the evidence regarding knowledge,
11 arguing that Defendant did not know that grain was present because it was placed
12 in the field several days prior to hunting and covered by snow when he arrived;
13 that when he was walking the field to place decoys, it was too dark to see the
14 ground well; and, in the intervening hours between when they started hunting and
15 when the officers arrived, enough snow had melted to expose the previously
16 hidden grain. These arguments are unpersuasive.

17 The Court is not persuaded that the grain was initially covered by snow and
18 thus not visible early on December 5, 2015, and then became exposed only when
19 the snow melted. This assertion is inconsistent with the testimony and the
20 photographic evidence. Defendant testified about the temperature conditions on

1 the morning of December 5, 2015. He testified that it was cold enough outside that
2 after setting up the decoys, the four hunters returned to a building to warm
3 themselves by a stove. He also testified that in the hunting blind, he was wearing
4 gloves and a full head covering to stay warm. Officer Scherzinger testified that it
5 was snowing when he arrived on the scene. Finally, video evidence from
6 December 5, 2015 shows that it was still snowing after the officers arrived on the
7 scene. If it was snowing when the officers arrived, it could not have been warm
8 enough for snow to melt and expose the grain. Additionally, the photographs show
9 that the grain is sitting on top of the snow, which is inconsistent with the theory of
10 exposure occurring due to snow melt. It is not logical that the temperature was
11 warm enough to melt sufficient snow to uncover previously covered grain by the
12 time the law enforcement officers arrived around 9:00 a.m.

13 Next, Defendant argued that visibility was reduced on the morning of
14 December 5, 2015 due to fog and snow. He argued that the reduced visibility
15 impeded his ability to see that the area he was hunting was baited. However this
16 argument is inconsistent with the officer's testimony, Defendant's own testimony,
17 and the photographic and video evidence. Officer Scherzinger testified that he
18 could see several hundred yards easily. Moreover, Defendant testified that he
19 could see the geese flying over the property from about half a mile away.
20 Additionally, he testified that Don Caraway was able to see an injured goose in the

1 field about half a mile away. Finally, the pictures and video taken on December 5,
2 2015 do not show any visibility challenges that would preclude one from seeing
3 the grain on the ground. These assertions cast doubt on the Defendant's claim that
4 visibility conditions were poor enough to impede his ability to see grain
5 approximately ten yards from the hunting blind or at his feet as he was retrieving
6 dead geese from the hunting field.

7 Don Caraway testified that he placed the grain in the field approximately
8 three to ten days prior to December 5, 2015. Mr. Caraway explained that he
9 disposed of 45 pigeons in the hunting field. After disposing of the pigeons, he
10 cleaned out the back of his truck by kicking all the grain onto the field. The Court
11 finds this testimony inconsistent with the manner in which the grain was dispersed
12 across the field. The grain was located across the field in various locations, not all
13 in one place.

14 The Court finds that the United States proved beyond a reasonable doubt
15 that Defendant knew and reasonably should have known that he was hunting over a
16 baited area.

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1 **IT IS ORDERED:**

2 The Court finds Defendant, Kurt W. Brain, **GUILTY** of the offense of
3 taking migratory game birds by the aid of bait, in violation of 50 C.F.R. § 20.21(i),
4 as charged in the citation.

5 DATED May 9, 2017.

6 s/Mary K. Dimke
7 MARY K. DIMKE
8 UNITED STATES MAGISTRATE JUDGE
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